

STATE OF MARYLAND  
BOARD OF CONTRACT APPEALS  
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SUMMARY ABSTRACT  
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2198	Date of Decision: 10/12/00
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Transportation Authority Contract No. 10032076	
Appellant/Respondent: Clean Venture, Inc. Maryland Transportation Authority	

Decision Summary:

Bid Protest - Timeliness - Where a bid is available for inspection at bid opening and the ground for protest would be apparent from a review of the bid, a protest upon such ground must be filed within seven days of bid opening.



"with an asterisk (\*) constituted the majority of the categories of materials for disposal and shall be used to determine the successful bidder." The prices bid were to include all costs associated with the pick-up, removal, testing and disposal of each type of material; i.e. we find that a reasonable bidder would understand that the prices bid were to include transportation costs. We also find that a reasonable bidder would understand that the low bid would be determined by adding up the prices bid for the asterisk (\*) items.<sup>1</sup>

2. Bid opening occurred on May 10, 2000 and Appellant was in attendance. Three (3) bids were received, including the bids from Appellant and Philip Services Corporation (Philip). Mr. David Roesler, Appellant's operations manager, was present at bid opening. The MdTA Procurement Officer read the bid amounts aloud from each bidders bid for the items marked with an asterisk. The Procurement Officer did not notice (and therefore did not announce at the bid opening) that the Philip's bid included the notation "Transportation costs: \$450.00/Load (pick-up)" on the bid sheet above the lines for bids for the specific items marked with an asterisk. The Procurement Officer was not aware of this possible qualification of or ambiguity in the Philip's bid until Mr. Roesler pointed it out to her on the afternoon of July 21, 2000.<sup>2</sup> Bids, however, were available for inspection following bid opening.
3. After bid opening the Procurement Officer's supervisor evaluated the bids for disposal/removal for the categories that had been identified by asterisk on the bid sheet in a

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<sup>1</sup> The amended bid sheet is attached to this opinion as Exhibit A.

<sup>2</sup> It is arguable that all three bids contained possible price qualifications or ambiguities. Only the Philip's transportation cost issue is properly before the Board as an issue of protest.

manner that the Procurement Officer was not able to explain at the hearing of the appeal. Philip's bid was determined to be the low bid pursuant to this evaluation. The evaluation results prepared by the Procurement Officer's supervisor (who did not testify at the hearing) are set forth in Exhibit B attached to this opinion.

4. On June 23, 2000 the Executive Secretary, MdTA, approved the awarding of the contract to Philip whose bid had been determined by MdTA to be the low bid based on the evaluation performed by the Procurement Officer's supervisor.
5. Appellant was notified by letter dated June 27, 2000 that it was not the successful bidder. Mr. Roesler, to whose attention this letter was addressed, testified that he was on vacation when the letter arrived at his office and that he did not see the letter until sometime during the week of July 10, 2000 after he had returned from vacation.
6. On July 21, 2000 Mr. Roesler called the Procurement Officer and asked if he could come by and get a copy of the bid results. He came that afternoon and was provided a copy of each bidder's bid sheet and the evaluation of the bids performed by the Procurement Officer's supervisor.
7. Appellant filed a protest with the MdTA Procurement Officer on July 25, 2000.
8. The grounds of protest were stated as follows:
  1. CVI's unit prices included transportation as required in the bid specifications while Philip's did not. They added an extra line item to cover transportation at \$450 per pickup. It is therefore a non-responsive bid and should have been rejected. Even if you allow them to list this price separately, it should have been factored into their total cost when determining who was the low bidder (as required by bid specification). If you factor their transportation charge in on a typical 2-4 drum pick-up, MdTA is paying over \$110 more per drum for transportation disposal. If only one drum is shipped, MdTA is paying disposal plus \$450 for

transportation. In reviewing the bid in determining the lowest bidder, this transportation charge was not included for Philip's but was for the other bidders. Once these transportation charges are included in the Philip's bid (as required in the solicitation), CVI is the lowest bidder. The transportation was to be incorporated in the drum cost and was done by all the bidders except Philip.

2. In reviewing the balance of the bid, CVI is lower on the majority of items, especially those which the Authority expects to use the most often (Labor and petroleum-impacted soils or sweeper dirt).
9. By final agency decision dated July 26, 2000, Appellant was advised that the protest was denied because it was not filed within seven days after notification as set forth in the letter of June 27, 2000 that it was not the successful bidder.
10. On August 9, 2000 Appellant filed an appeal of the denial of the protest with this Board. In comment on the Agency Report filed with the Board on September 13, 2000, Appellant asserted that it first learned upon receipt of the Agency Report (which Appellant received on or about September 1, 2000) that the agency used an undisclosed ranking or scoring system to determine the low bid that was not set forth in the IFB or otherwise disclosed to bidders. COMAR 21.05.02.13 provides in relevant part that a bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids.
11. Appellant requested a hearing and the appeal was heard on Friday, September 29, 2000.

#### Decision

Under Maryland Procurement Regulations, Appellant's protest was required to be filed not later than seven days after the basis for the protest was known or should have been known, whichever was earlier. COMAR 21.10.02.03B. The term "filed" means receipt by the Procurement Officer of the protest. COMAR 21.10.02.03C.

Whether a bidder knew or should have known of the basis of its protest has been strictly construed by this Board, and under COMAR 21.10.02.03C a protest filed one day late may not be considered. See, e.g., Ismart, LLC, MSBCA 1979, 5 MSBCA ¶417(1997).

COMAR 21.05.02.11B provides:

B. Opening and Recording. Bids and modifications shall be opened publicly, at the time, date, and place designated in the invitation for bids. The name of each bidder, the bid price, and such other information as is deemed appropriate shall be read aloud or otherwise made available. This information also shall be recorded at the time of bid opening. The bids shall be tabulated or a bid abstract made. The opened bid shall be available for public inspection at a reasonable time after bid opening but in any case before contract award except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in this title. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices, makes, and model or catalog numbers of the items offered, deliveries, and terms of payment shall be publicly available at a reasonable time after bid opening but in any event before contract award regardless of any designation to the contrary at the time of bid opening.

Appellant attended the bid opening on May 10, 2000 when opened bids would have been available for public inspection. The grounds of Appellant's protest herein concerning the \$450.00 transportation charge issue in the Philip's bid would have been apparent based upon a review of the Philip's bid on May 10, 2000. See The Traffic Group, Incorporated, MSBCA 1883 & 1888, 4 MSBCA ¶381(1995).

Appellant's operations manager, Mr. Roesler testified that, he believed, based on the prices read aloud by the Procurement Officer, that his company could not be the low bidder. The Procurement Officer testified that she did not comment on the Philip's

transportation charge issue at the bid opening because she did not notice it until it was later pointed out to her on July 21 by Mr. Roesler.

The record reflects, however, that bids would have been available for inspection had Mr. Roesler or any other representative of Appellant asked to see them at bid opening. The issue is thus whether, as argued by Appellant, the failure of the Procurement Officer to notice and read aloud the transportation charge material from the Philip's bid excuses the Appellant from not requesting to see the bid at bid opening. We believe that the better rule requires a bidder to inspect a bid at bid opening or at the time it is or would be available for inspection if not available for inspection at bid opening. The Traffic Group, Incorporated, supra. In this appeal we find that Appellant's decision not to review the bids at bid opening is not excused by the innocent conduct of the Procurement Officer in failing to notice and comment on the transportation charge issue.<sup>3</sup> Any protest was thus due within seven days from the bid opening on May 10, 2000, or May 17, 2000. Appellant, however, did not file a protest until July 25, 2000.

We recognize that the Procurement Officer denied the protest under COMAR 21.10.02.03B on grounds that the protest was not filed within seven days of notification as contained in the June 27, 2000 letter to Appellant that Appellant was not the successful bidder. The protest should have been denied under COMAR 21.10.02.03B on grounds that Appellant did not file its protest within seven days of bid opening where inspection of the Philip's bid would have revealed the transportation charge.

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<sup>3</sup> We stress, however, that if a record should reflect that a procurement officer deliberately failed to comment on a matter that might affect the bid prices as actually read aloud our decision might be different. Compare Grady & Grady, Inc., MSBCA 1455, 3 MSBCA ¶217(1989).

Appellant also complains about an undisclosed ranking or scoring system that was used to determine the low bid. Any protest concerning the methodology for evaluating the bids on a basis not disclosed to bidders was required to have been filed within seven days of July 21, 2000 when Appellant's operations manager, Mr. Roesler, was provided with a copy of the price evaluation sheets prepared by the Procurement Officer's supervisor. The issue was not raised, however, until the filing of comment on the Agency Report with the Board on September 13, 2000 by Mr. Michael Lancos, Appellant's branch manager. Therefore, such protest was not made within seven days and is untimely.<sup>4</sup> COMAR 21.10.02.03B

Pursuant to COMAR 21.10.02.03C, a Procurement Officer may not consider an untimely protest and, accordingly, this Board lacks jurisdiction to consider such untimely protest on appeal. The Traffic Group, Incorporated, supra; Aquaculture Systems Technologies, LLC, MSBCA 2141, 5 MSBCA ¶\_\_\_\_ (September 8, 1999). As the protests herein were filed more than seven days after Appellant had knowledge, or should have had knowledge, of the bases for the protests, the protests could not be considered by the Procurement Officer and this Board is without jurisdiction to hear this appeal. Thus, the appeal must be dismissed.

We must dismiss this appeal for lack of this Board's jurisdiction, notwithstanding, that the record reflects that (1) MdTA used an undisclosed scoring system to determine price (2) it cannot be determined from the record how the prices were scored to determine the low bid (3) the MdTA Procurement Officer does not know how the low bid was determined and (4) the Philip's bid may be ambiguous.

The procurement was clearly conducted in violation of the

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<sup>4</sup> We recognize that protests are to be filed with the agency procurement officer. At the time the Appellant filed comment on the Agency Report the seven day period for filing such protest with the agency had long expired.

General Procurement Law and its implementing regulations.<sup>5</sup> However, as noted, this Board is without jurisdiction to address such defect. Wherefore, it is Ordered this            day of October 2000 that the appeal is dismissed.

Dated:

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Robert B. Harrison III  
Board Member

I concur:

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Randolph B. Rosencrantz  
Chairman

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was

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<sup>5</sup> While not before the Board as a issue of protest we notice that the amended bid sheet provides for contract renewal for two additional one year periods with the renewal price based on half of the original two year price. This raises an issue of how to calculate a two year price.

required by law to be sent to the petitioner; or  
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2198, appeal of Clean Venture, Inc. under Transportation Authority Contract No. 10032076.

Dated:

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Mary F. Priscilla  
Recorder